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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-48

ROBERT A. SUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the evidence established multiple conspiracies rather than the single conspiracy charged in the indictment; (2) that the alleged variance between the pleadings and the proof should have been resolved by the district court rather than by the jury; (3) that alleged prosecutorial misconduct constituted prejudicial error; and (4) that the dangerous special drug offender sentencing statute (21 U.S.C. 849) is unconstitutional on its face or as applied to him.

Following a jury trial in the United States District Court for the District of Columbia, petitioner and Zebadee Jenkins were convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 841(a) and 846. Petitioner was sentenced under the provisions of the dangerous special drug offender sentencing statute, 21 U.S.C. 849, to a term of six to eighteen years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (Pet. App. 47-50; 511 F.2d 448).

As petitioner concedes (Pet. 5), the evidence adduced at trial established that a retail narcotics operation under the auspices of David McNeil existed in the District of Columbia from May 1972 to April 10, 1973.[1] Until mid-December 1972, the retailers procured their heroin from Zebadee Jenkins, a cousin of McNeil residing in New York City. In January 1973, Charles Cameron became the retailers' principal supplier; Cameron continued to supply heroin until April 10, 1973, when the police arrested the retailers and seized a large quantity of heroin. Petitioner acted as a go-between, intermediating both the retailer-Cameron and the retailer-Jenkins transactions.

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[1] Seventeen persons were indicted in the District of Columbia on June 18, 1973, for conspiring to distribute heroin. Thirteen of those defendants, all of whom were members of the McNeil retail operation, pleaded guilty. The four defendants who went to trial were involved in the wholesale aspect of the conspiracy. Hazel Vento was granted a judgment of acquittal; Charles Cameron was granted a mistrial when the jury was unable to reach a verdict; Jenkins and petitioner were convicted.

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1. Petitioner contends (Pet. 5-8, 14-18) that the evidence at trial established at least three distinct conspiracies rather than the single conspiracy charged in the indictment. The McNeil retail operation and the two wholesale suppliers, Jenkins and Cameron, petitioner argues, each involved a separate conspiracy. The evidence, however, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), demonstrates an agreement and concert of action among McNeil, Jenkins and petitioner to distribute heroin in the District of Columbia through the McNeil retail operation.

The testimony at trial revealed that McNeil continued to purchase heroin from Jenkins even after Cameron became an additional source of supply (Tr. 1495-1511). That McNeil used two suppliers hardly transforms his operation into two or more conspiracies. There was but a single core operation, even though not all the actors participated in each transaction or knew all the details. See *Blumenthal* v. *United States*, 332 U.S. 539. The question to be resolved at trial was whether Cameron had so associated himself with the ongoing McNeil conspiracy that he became culpable for all of its acts or whether there was a separate McNeil-Cameron conspiracy. That question was put to the jury with an instruction that, if it found more than one conspiracy, it should acquit. The jury was unable to reach a verdict concerning Cameron despite the massive evidence of the Cameron-McNeil transactions, and, as the court of

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appeals concluded, it thereby demonstrated that it understood its task and conscientiously carried it out (Pet. App. 49). The fact that the jury was unable to agree as to Cameron's participation in the conspiracy of which the other defendants, including petitioner, were convicted in no way impairs the validity of its conclusion regarding the other participants.

Petitioner alternatively contends (Pet. 13-22) that the Court should exercise its supervisory power and direct the federal courts to follow the provisions of the *Model Penal Code* in criminal conspiracy prosecutions. This is a request for the Court to forsake its task of making case-by-case adjudications and to pronounce a set of developed rules more appropriately left—as the draftsmen of the *Model Penal Code* intended—for consideration by legislatures. This Court has carefully forged the body of conspiracy law in dozens of cases spanning many decades.[2] If that body of law is to be swept away, as petitioner urges, the task should be accomplished by Congress rather than by the courts.

2. Petitioner urges this Court to require that the question of variance between the number of conspira-

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[2] Many of these cases establish important procedural protections for those accused of conspiracy. See, *e.g.*, *Bruton* v. *United States*, 391 U.S. 123 (non-testifying co-conspirator's confession); *Ingram* v. *United States*, 360 U.S. 672 (requirement of knowledge); *Grunewald* v. *United States*, 353 U.S. 391 (concealment); *United States* v. *Bayer*, 331 U.S. 532 (overt act); *Kotteakos* v. *United States*, 328 U.S. 750 (single conspiracy must be proved); *Pinkerton* v. *United States*, 328 U.S. 640 (membership at time of substantive offense); *Glasser* v. *United States*, 315 U.S. 60 (proof *aliunde*).

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cies pleaded and the number proved be determined by the court rather than by the jury (Pet. 23-28). But, as petitioner acknowledges (Pet. 23), the federal courts uniformly have held that this question properly is resolved by the jury. See, *e.g.*, *United States* v. *Brown*, 495 F.2d 593 (C.A. 1), certiorari denied, 419 U.S. 965; *United States* v. *Vicars*, 467 F.2d 452 (C.A. 5), certiorari denied, 410 U.S. 967; *United States* v. *Varelli*, 407 F.2d 735 (C.A. 7), certiorari denied *sub nom. Saletko* v. *United States*, 405 U.S. 1040; *United States* v. *Aiken*, 373 F.2d 294 (C.A. 2), certiorari denied, 389 U.S. 833; *Koolish* v. *United States*, 340 F.2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *Green* v. *United States*, 332 F.2d 788 (C.A. 5), certiorari denied, 379 U.S. 949. Petitioner's argument that the issue is too complex to be entrusted to the jury is inconsistent with the jury's historic function, under the Sixth Amendment, to resolve even the most complex questions of fact (and mixtures of fact and law) that go to the general issue of guilt. Indeed, we think that defendants might have good constitutional ground to complain if an issue of this nature were removed from the jury's purview. Cf. *Jackson* v. *Denno*, 378 U.S. 368; *United States* v. *Barry*, 518 F.2d 342 (C.A. 2) (jury must pass upon voluntariness of confession).

3. Petitioner contends (Pet. 28-34) that the trial was infected "with repeated instances of prosecutorial misconduct" (Pet. 30) so serious that the misconduct cannot have been harmless error. However, the prosecution did not engage in a pattern of inten-

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tional misconduct. At the sentencing of co-defendant Jenkins the district court characterized this trial as "a very fair trial" (Tr. 3056). The instances of "misconduct" cited by petitioner (Pet. 8-11, 30-31) lend no support to his contention, nor do they reflect an "overriding ambition" to secure a conviction by any means necessary (Pet. 31).

For example, while petitioner claims that the prosecution neglected the Jencks Act, he overlooks the fact that defense counsel received voluminous Jencks Act material prior to and during the trial. Petitioner discusses a minor instance of nonproduction (Pet. 8) involving government witness Masterson.[3] After Masterson had testified and had left the courthouse,[4] defense counsel discovered a set of notes written by Detective Robert Kanjian during an interview with Masterson the day before her testimony. Government counsel agreed to stipulate that the notes should have been produced and that Masterson, if recalled, would testify that she had never seen Cameron in a particular apartment (Tr. 1822-1823). This information,

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[3] Since Masterson's testimony related exclusively to Cameron (except for her identification of the picture of co-conspirator), petitioner's trial counsel elected not to cross-examine her (Tr. 1572-1573). Indeed, the court considered her testimony to be "insignificant" (Tr. 1641) and wondered why the prosecution had called her as a witness (Tr. 1564-1565).

[4] The record does not support petitioner's contention that Masterson had left the jurisdiction (Pet. 8). The prosecutor offered to attempt to contact her (Tr. 1641), but was not given the opportunity.

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from a minor witness, did not reflect on petitioner; the trial court correctly found that the notes had been unintentionally withheld and that their tardy production was harmless (Tr. 1703-1704, 1821).[5]

Petitioner also claims (Pet. 9) that exculpatory evidence relating to the pre-trial identification of Cameron by co-conspirator Lenwood Sharpe was withheld in violation of *Brady* v. *Maryland*, 373 U.S. 83. At the pre-trial hearing to determine the admissibility of Sharpe's identification testimony, the prosecutor disclosed portions of Sharpe's grand jury testimony pertinent to these identifications but neglected to disclose Detective Kanjian's grand jury testimony, which described Sharpe's photographic identification of Cameron as "tentative." However, Kanjian's statement was disclosed prior to Sharpe's testimony at trial, and defense counsel were able to question Sharpe about his photographic identification of Cameron (Tr. 1961-1963). Defense counsel also were able to bring out during cross-examination of Kanjian

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[5] Another inadvertent omission involved a prior statement by Joann Enoch (one of the retailers) to Detective Kanjian; other Jencks Act material pertaining to Enoch had been given to defense counsel prior to trial (Tr. 9). After Enoch's testimony and the discovery of this statement, the prosecutor informed the court that the statement had been overlooked (Tr. 1167-1168). He suggested that defense counsel be permitted to re-open their cross-examination of Enoch (Tr. 1168-1169); the court agreed to permit further cross-examination of Enoch, but defense counsel declined (Tr. 2131). The court found that the delayed disclosure of this material had not prejudiced petitioner (Tr. 1188-1189, 1192). All defense counsel, in fact, agreed that the prosecutor had not deliberately withheld the material (Tr. 1170-1171, 1173, 1180).

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the "tentative" nature of this identification (Tr. 2630-2632). No exculpatory material has been withheld either from petitioner or from the jury.

Petitioner's other claims of intentional misconduct are not well taken. Petitioner's assertion that the prosecutor's reference to heroin as the nation's number one enemy, and to the defendants as the "New York gang" represented by "New York lawyers", intimidated the jury (Pet. 11), is unsupported speculation. Moreover, the presence of various members of the United States Attorney's Office in the courtroom during various segments of a fourteen day trial, and even the "threatened" prospect of interlocutory appeals (Pet. 9),* did not intimidate the trial court. The court of appeals correctly found (Pet. App. 49):

> We are unable to see any impropriety in the United States Attorney or other principal prosecutors attending a trial of such importance particularly at crucial moments which may have required them to make a judgment whether an interlocutory appeal should be taken. There is nothing in the record before us to show that any actions of the United States Attorney were impermissible or undercut the fairness of the trial.

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* One instance of a "threatened" interlocutory appeal occurred when the trial court ruled that *United States* v. *Ash*, 413 U.S. 300, required the presence of counsel at a post-indictment photographic identification. Because of this ruling the prosecutor, outside the presence of the jury, asked leave of the court to consult with his supervisory personnel concerning an interlocutory appeal (Tr. 821-858). This action was both necessary and proper.

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Nor was the harmless error rule erroneously invoked with respect to the prosecution's reference in summation to his ability to call several hundred additional witnesses. Petitioner concedes that the record contains substantial evidence of his guilt (Pet. 31). The prosecutor's overstatement was met with a prompt cautionary instruction, and it is extraordinarily unlikely that the jury's verdicts could have been affected. Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637.

4. Petitioner's challenge (Pet. 34-42) to the constitutionality (either facial or as applied) of the dangerous special drug offender sentencing statute (21 U.S.C. 849) was not raised in either the district court or the court of appeals and, accordingly, should not be considered here. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. Even if the claim were properly presented, we submit that it would be unnecessary for the Court to consider the questions. The lower federal courts are just beginning their consideration of Section 849 and its progenitor, 18 U.S.C. 3575. There is no conflict among the circuits, and several of the district court decisions considering Section 3575 are now on appeal. The Court should await developments in the courts of appeals before deciding whether it is necessary to consider these questions.[7]

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[7] Several district courts have considered the meaning and constitutionality of Section 3575. See *United States* v. *Duardi*, 384 F. Supp. 874 (W.D. Mo.), appeal pending, C.A. 8, No.

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In any event, petitioner's claims are insubstantial. Petitioner contends that Section 849(e)(2) and (e)(3) (defining a "special drug offender") are impermissibly vague and subject him to trial without jury and to double jeopardy. But "statutes are not automatically invalidated as vague simply because difficulty is found in defining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32. Moreover, the standard for determining the vagueness of a sentencing statute should be more relaxed than the test for determining the vagueness of a statute defining a substantive offense; a statute such as Section 849 deals with an area in which the sentencing judge has traditionally possessed discretion without regard to *any* standards. *Williams* v. *New York*, 337 U.S. 241; *Dorszynski* v. *United States*, 418 U.S. 424. Petitioner hardly can complain that Section 849 is vague as compared with this historical practice. Most of petitioner's complaints depend upon the notion that Section 849, in some manner, creates or defines a "crime." It does not. It simply structures the dis-

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75-1354; *United States* v. *Tramunti*, 377 F. Supp. 6 (S.D. N.Y.); *United States* v. *Holt*, No. 3-75-224, S.D. Tex., decided August 18, 1975. The Eighth Circuit recently has addressed the requirement of Section 849(a) that the notice set out "with particularity" the prosecution's reasons for invoking the statute. See *United States* v. *Kelly*, No. 74-1962, decided July 14, 1975. Two cases have dealt with the problem whether notice has been timely filed. *United States* v. *Noland*, 495 F.2d 529 (C.A. 5); *United States* v. *Edwards*, 379 F. Supp. 617 (M.D. Fla.), appeal pending, C.A. 5, No. 74-3248.

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cretionary process by which those guilty of some specific crime will be punished. Indeed, Section 849 offers petitioner a full adversarial hearing and disclosure of all evidence and considerations upon which the sentence is based—advantages he would not receive in any alternative sentencing procedure.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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